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COMMERCIAL DISPUTE RESOLUTION PROJECT

Final Report

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This publication was produced for review by the United States Agency for International Development. It was prepared by Chemonics International Inc.

COMMERCIAL DISPUTE RESOLUTION PROJECT

Final Report

Support for Economic Growth and Institutional Reform –
Legal and Institutional Reform (SEGIR LIR) IQC

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EXECUTIVE SUMMARY

Alternative forms for resolving disputes are used increasingly around the world. The availability of dispute resolution is an especially urgent issue for developing countries. Alternative dispute forums increase access to justice, provide ways to resolve disputes effectively and efficiently, and encourage parties to be more cooperative. It also complements the work of national courts by helping alleviate the backlog of cases.

In the commercial context, businesses want and need to resolve disputes efficiently and in accordance with the laws and with respect for contractual obligations. International investors and domestic small businesses need to rely upon the enforcement of legal rights in a transparent and timely manner. The inability to enforce obligations directly hinders economic development and inhibits future investment. Often, business parties prefer to settle disputes through alternative forums rather than using national courts, typically by arbitration and mediation, and national courts and other authorities should respect and enforce this choice.

In many countries emerging from socialism in Central and Eastern Europe, visionaries are trying to build institutions that can provide effective commercial dispute resolution services to businesses. These developing institutions face a number of challenges and need support. The USAID-funded Commercial Dispute Resolution Project (CDR) responded to the needs of these developing institutions by linking selected institutions within the region and facilitating a mentoring relationship with a more experienced institution in a nearby, more developed country. Through this innovative, regional cooperation and with the technical assistance provided through the CDR Project, these institutions and their participating alternative dispute resolution advocates accessed experts in international standards of dispute resolution and the shared experience of the mentoring institution. Armed with this information, these institutions were able to more effectively build the political will and legislative framework necessary to make arbitration and mediation a viable alternative to litigation.

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INTRODUCTION

The Commercial Dispute Resolution Project (CDR) contributed to making available effective methods for resolving commercial disputes in a number of countries in Eastern Europe and the former Soviet Union. While the project focused on strengthening existing institutions and initiatives that seek to provide arbitration and mediation services, it impacted a large range of stakeholders and achieved results beyond its immediate goal of assisting selected institutions. The CDR Project was considered to be successful for the following initiatives. The project:

- Supported the development of existing arbitration and mediation institutions and initiatives in two regions
- Reached a broad range of geographically and professionally diverse stakeholders
- Developed an innovative regional approach, forming networks that could endure
- Facilitated stakeholder to stakeholder mentoring and sharing of knowledge
- Provided cost effective service by using pro bono services of established international arbitration professionals and promoted networking between them and local stakeholders
- Shared knowledge extensively in the fields of arbitration and mediation through symposiums and roundtable events and preparing and distributing extensive supportive materials
- Empowered developing arbitration institutions and making them more effective in providing services
- Created effective methodology for promoting the development of commercial dispute resolution.

The CDR Project included two important strategic objectives: accelerated growth and development of private enterprise, and legal systems that better support democratic and market reforms. The CDR Project was designed to contribute to these objectives through support for the following program goals:

- Establish a policy, legal, and regulatory framework conducive to broad-based competition and private sector growth
- Strengthen independent, efficient legal institutions that can effectively and fairly implement legal reforms and support a democratic rule of law society
- Stimulate development of private sector enterprises.

By supporting the development of effective commercial dispute resolution, the United States Agency for International Development (USAID) through the CDR Project helped establish needed legal framework, promoted economic development, and encouraged the rule of law in the two regions. In both of these regions there is a need to encourage judicial reform and to improve the capacity of the courts to resolve disputes. And in both of these regions, businesses need and want access to effective dispute resolution services where they can efficiently enforce legal and contractual rights. By strengthening institutions that provide commercial dispute resolution services the CDR Project helped promote respect for legal and contractual rights, which is necessary to a favorable business environment and democratic society.

The CDR Project successfully met its objectives by employing an innovative methodology: facilitating stakeholders to mentor other stakeholders and involving a broad group of diverse stakeholders. The project helped build the capacity of and strengthened developing arbitration and mediation institutions by facilitating a mentoring relationship between them and a more experienced arbitration or mediation institution in the same region. Recognizing that developing effective CDR involves a range of groups and interests, the project reached out to representatives of arbitration and mediation institutes, but also to judges, Ministry of Justice officials, parliamentarians, lawyers, academics, and business people. The primary thrust of the project was to create links between these groups of people from a number of countries within each of the two regions and to support the exchange of information, experience, and knowledge about commercial dispute resolution. The CDR Project successfully created regional links and facilitated stakeholder-to-stakeholder mentoring that was supported by regional symposiums and follow-up activities. These follow-up activities reinforced best practices for commercial dispute resolution and facilitated information sharing and the overall development of CDR.

The project contained two identical but separate parts, one for Support for East European Democracy (SEED) countries and one for FREEDOM Support Act (FSA) countries. For each of these regions there were five basic components to the project. First, the project conducted a limited assessment of the status of commercial dispute resolution in a number of countries in each of the two regions. Second, based upon this assessment, the project identified a few countries in each region that would benefit from the project and selected institutions or initiatives within these countries to participate. The project also identified an institution that would act as the mentoring institution for each of the regions. The project then prepared a plan of cooperation to facilitate the mentoring and networking between the institutions and other relevant stakeholders. Next, the project arranged for regional symposiums that provided an opportunity for the participants to meet, discuss, obtain knowledge, and share information to create regional networks. The final component was arranging follow-up events that strengthened the regional networking and ensured continued mentoring and sharing of knowledge and information.

CDR PROJECT COMPONENTS

- Conduct a limited CDR assessment
- Recommend selected CDR institutions
- Prepare a program of cooperation
- Organize visits to the model institutions
- Organize follow-up visits

DEFINING CDR AND ITS IMPORTANCE

In all of the countries targeted by the CDR Project, there are nascent or developing institutions and initiatives that want to provide commercial dispute resolution services to businesses. Irrespective of whether these institutions and initiatives are offering arbitration or mediation services and whether they are private initiatives or affiliated with a court, these developing institutions face significant challenges. To become successful they need national laws creating a modern legal framework that reflects internationally accepted standards, political willingness to accept and support non-judicial commercial dispute resolution, internal operating structures and practices that reflect internationally accepted best practices, a well-trained group of arbitrators or mediators, acceptance and use of their services by the business community, judicial enforcement and support for agreements to arbitrate and mediate and enforcement of outcomes, lawyers' acceptance of and training for arbitration and mediation, academics teaching and writing about arbitration and mediation, and general public outreach to educate and integrate the processes into the social and legal culture. The CDR Project helped selected developing institutions respond to these challenges.

The developing institutions in the targeted countries are not alone in wanting to develop effective methods for efficiently and fairly resolving commercial disputes. The business community in all of the targeted countries is eager to have access to alternative forms of dispute resolution. The nature of these disputes, the degree of their complexity, the type of business sector involved, and many other factors varied considerably in the project according to the particular contexts of each institution and country that was involved in the project. For example, in some countries such as in the former Yugoslavia there is a need to resolve small disputes between businesses that have backlogged the courts. In other countries, such as Kazakhstan, there is also a need to resolve larger disputes arising out of oil and gas resource investments. However, in all of the countries, developing institutions were eager to offer state-of-the-art services and wanted to

gain knowledge and expertise while business leaders wanted access to reliable alternative dispute resolution methods.

The CDR Project did not promote a particular type of dispute resolution method. Commercial Dispute Resolution (CDR) refers to a variety of processes that are used to resolve commercial disputes. These processes can range from highly informal, such as assisted settlement discussions between the parties, to highly formal, such as complex litigation in multi-tiered court procedures. However, in most contexts, CDR refers to non-binding mediation and binding arbitration. These forms of dispute resolution are often also used in non-commercial settings such as in family law cases and people more commonly use the term ADR, alternative, or more recently, "appropriate" dispute resolution. We use the term CDR to emphasize that the project dealt only with commercial disputes.

But while CDR refers to resolving disputes, promoting CDR does more than resolve disputes. It also has an important role to play in promoting democracy, improving the rule of law, and contributing to economic growth. It plays this role by focusing on implementing methods to effectively protect legal and contractual rights thus ensuring that legal reforms are actually implemented. Legal reform efforts that followed the fall of communism focused on helping the newly independent countries develop new legal structures – building institutions and enacting laws – to support privatization, economic growth, and democracy. Despite substantial progress in creating the ostensible legal framework and institutions, this legal machinery has often not functioned efficiently..

Although the laws and institutions may look good on paper, in practice they may not produce the intended results. In many countries the newly adopted legal structures have not been fully implemented due to inadequate integration into existing legal culture, embedded totalitarian attitudes, corruption, lack of training and resources, insufficient commitment to reform, and other reasons. Judges have been underpaid, over-worked, and often are unfamiliar with the legal concepts underlying the extensive body of new laws they are charged with applying. While court reform and improvement is currently

TYPES OF COMMERCIAL DISPUTE RESOLUTION

- Assisted negotiated agreement
- Early neutral evaluation
- Mediation/Conciliation
- Non-binding arbitration
- Binding arbitration
- Mini trial
- Summary proceedings
- Litigation

underway in many of the targeted countries, this work will take time. Business is stifled and unnecessary costs are incurred by the lack of effective mechanisms to efficiently enforce contractual and legal rights. Public and investor confidence in the entire legal system is undermined when laws and contracts only create illusory rights.

Even modern laws are useless unless they are enforced and a contract is only an empty promise unless the promise can be enforced without undue delay, expense, or uncertainty. Arbitration and mediation can be useful when national court systems are unwilling or unable to resolve disputes efficiently, transparently, and according to applicable laws. Arbitration provides the means for enforcing such rights with a reasonable level of predictability, efficiency, and fairness. Mediation can help disputing partners find a mutually acceptable solution by encouraging the parties to focus on their respective interests and solving rather than arguing their points of dispute and thus perhaps even salvage their business relationship. Economic growth happens when there is respect for contracts and laws and where the risks and costs of business can be predicted and calculated. The existence of effective dispute resolution is a decisive component of a business-friendly environment and a democratic state.

Promoting arbitration and mediation can contribute to strengthening courts and other institutions, thus contributing to strengthening democracy and improving good governance. Courts are encouraged to adopt fair and efficient procedures when parties expect, demand, and receive efficient dispute resolution in alternative forums. An effective arbitration and mediation project must also address educating judges about their role in supporting arbitration and mediation. This judicial education and outreach can help courts to adopt better practices and generally improves their understanding of commercial laws and process. Arbitration and mediation can help alleviate the burden on the courts by eliminating case dockets and allowing them to focus on fewer cases. Litigation and arbitration and mediation

CDR: RESOLVING MORE THAN DISPUTES

- Strengthens the independence of the judiciary
- Alleviates backlog
- Improves judicial efficiency
- Promotes adoption of international standards
- Encourages legal and institutional reform
- Reduces potential corruption

CDR: PROMOTING ECONOMIC GROWTH

- Respects private property rights
- Creates a more predictable commercial environment
- Reduces cost of doing business
- Improves enforcement of obligations
- Protects legal rights
- Encourages investment
- Promotes trade
- Responds to the needs of business

should not be viewed as competitors in the dispute resolution business but rather as partners.

Even in countries with highly efficient and effective judicial systems, businesses often prefer the flexibility, efficiency, and confidentiality offered by alternative dispute resolution. International businesses, in particular, find arbitration and mediation attractive because it allows the parties to select neutrals to decide their disputes, often in a country that is unconnected to the parties or the business transaction. They can choose the applicable law, the language of the proceedings, the expertise of the decision-makers, and the procedure. Importantly, unlike national court judgments, an arbitral award will be enforceable in more than 130 countries that have signed the New York Convention.

Free markets and democratic societies respect the right of businesses to make business decisions. Arbitration and mediation are based upon the agreement of the parties to submit their disputes to this type of resolution and like any other contract rights, the right to settle a dispute through such procedures should be respected and enforced. The CDR Project supported the right of choice by supporting institutions seeking to provide arbitration and mediation services to the business community. By supporting this right of choice, the project also supported respect for property rights. Contract rights are important property rights and they are also are essential to ensure the ability to exploit and trade in other property rights.

Alternative forms of dispute resolution complement traditional court-controlled methods of resolving disputes and improve access to justice. Arbitration, mediation, and other forms of commercial dispute resolution offer opportunities to resolve disputes in forums and with methods more efficient and better suited to the characteristics of the dispute. Not only does CDR reduce the time and cost of resolving disputes but it can also increase the access to justice by disadvantaged groups, offer alternatives to ineffectual or discredited courts, encourage reform of court procedures, and by increasing the involvement of the participants it can engender a sense of civic engagement and improve voluntary compliance with outcomes.

A REGIONAL APPROACH

The CDR Project employed a unique approach and also developed innovative methodologies that enhanced the effectiveness of the project and produced tools for designing and implementing future projects involving CDR. A central component of the CDR Project was that it approached the development of effective commercial dispute resolution on a regional basis. Taking a regional approach maximizes resources, knowledge sharing, generates new ideas and the exploration of solutions, provides role models, encourages reform, promotes international best practices and standards, strengthens political and cultural will, and encourages commitment. A regional approach contributes to a predictable, stable, and level playing field. The people and groups who worked with the CDR Project all expressed the desire to have increased regional networking and confirmed the importance of creating a regionally enhanced legal and business climate.

There is a global trend for business to be conducted on a regional scale and this is particularly true in the former Soviet Union and Eastern European regions. Economies of scale and modern business methods encourage cross-border trade and a region-wide approach to commerce and investment. The historical, legal, and cultural shared past also influences the tendency towards regional approaches to business. A regional approach to commerce is encouraged by the fact that these countries have conducted business and other relations in commonly understood languages in the past. These countries have long been trading partners and have also had extensive interaction in other areas such as law, education, and politics. They have been subject to similar development efforts and share the challenge of implementing new laws and policies into similar cultures.

A regional approach is called for because the proliferation of intergovernmental agreements and conventions, increasing cooperation between governmental authorities that regulate business, extensive contacts and exchanges between academic institutions in business, economic and legal departments, the creation of accepted international business and industry standards, and the general move towards harmonization of a range of commercial laws, as is evidenced by the extensive ratification and enactment of the conventions and model laws of the United Nations Commission on International Trade Law (UNCITRAL), the directives and regulations in commercial law in the European Union, and unification of law efforts of other regional and global organizations.

The District Court in Ljubljana was very satisfied with the activities undertaken within the CDR project. We were especially happy and honored, to be chosen for model institution in this project. The CDR Symposium in Ljubljana was superbly organized and carried out. We were more than willing to present our experience with establishing ADR program to the participants from other countries. After the conference, our court remained in very good relations with the participants. In fact, we have carried out many different activities since then (conference for judges in Sarajevo, a study visit from judges from Montenegro, Serbia and Croatia in Slovenia, a conference in Tirana, a seminar in Podgorica etc), where we followed up on the progress and exchanged our knowledge and experience in the field of ADR. I can only conclude that initiatives as this one, are always very welcome and useful. They not only spread the knowledge, but also connect people, both in professional (networking) and private way. We would like thank the organizers once again for all there efforts and devotion."
– JUDGE ALES ZALAR, PRESIDENT, THE LJUBLJANA DISTRICT COURT

The countries in these regions share common factors that relate to the development of commercial dispute resolution. Because of the effects their past controlled economies had on the legal culture, concepts of party autonomy and contractual freedom are not fully realized in many of the countries in these regions. However, there are some significant differences between the two regions. While Eastern Europe historically has Roman law traditions underlying its legal culture as exists in other parts of Europe, the former Soviet countries have long had strong authoritarian state traditions and have not had the same exposure to concepts of pluralism and individual rights as the Eastern European states.

It's natural for Eastern European businesses to seek markets across borders. The region has a long history of trading between countries and the relatively small population and geographical size of each country encourages traders to exploit neighboring markets. Regional commerce can be enhanced if the region can offer stable commercial dispute resolution to resolve the disputes that inevitably arise in business transactions. Often businesses prefer a neutral dispute resolution process in a third country to reduce the likelihood for parochial favoritism and becoming mired in prolonged, contentious litigation with uncertain outcomes. The expansion of the European Union has also influenced these countries to seek to promote the flow of capital, services, goods and people unhindered throughout the region. To encourage cross-border business activity, these countries seek to create a level playing field and offer harmonized business environments. As a result, it is natural that commercial dispute resolution should be approached on a regional level.

A regional approach is also natural in the former Soviet countries although these countries tend to have large populations and long distances between major cities. These countries share common legal cultures, most people speak Russian, and there is a historic and current practice of cross-border trade. There are formal and informal channels of cooperation between business, academics, institutions, and organizations in the region. The legal framework in former Soviet countries has many similarities stemming from their shared Soviet past. The market reforms that have been undertaken in these countries have been accompanied by legislation influenced by Western laws. However, because the legal traditions in the former Soviet countries differ from those of the Western countries, these new laws are not rooted in the same foundations and legal thinking.

These countries also share similar challenges in developing more effective CDR. Although during the Soviet times there was a type of arbitration for conflicts between state corporations and there were also "third-party arbitrations," which resolved conflicts between foreigners and state corporations, these arbitrations did not conform to

modern concepts of private commercial arbitration. Unfortunately, the former Soviet countries have had a less than good reputation regarding a number of issues related to effective CDR such as a lack of adherence to international standards in enforcement of foreign arbitration agreements and awards, inadequate judicial independence, problems with corruption, and a lack of legal certainty and respect for the rule of law. However, many of these countries have recently adopted, or are considering, UNCITRAL-based arbitration and mediation legislation. Not only will this provide a modern statutory foundation to support CDR but it creates an excellent basis for common training and education programs, as was demonstrated by the successful symposium and roundtable events organized by the CDR Project. Most of the countries in the region are eager to obtain more educational and training opportunities for judges about their role in supporting arbitration and mediation

Currently, the field of commercial dispute resolution is very dynamic and people are eager to meet, discuss and share ideas and experience across borders. In both Eastern Europe and former Soviet countries, there is a history of regional cooperation that continues to be attractive to local stakeholders. There are formal and informal channels of cooperation between stakeholders, institutions, and organizations in the region that need to be strengthened and expanded. For example, just prior to the start-up of the CDR Project, the Ljubljana District Court organized a regional ADR conference that attracted more than 100 participants from the region. The CDR Project assessment found that there was considerable interest in all countries in learning about and cooperating with counterparts in neighboring countries. The results of the assessment were confirmed at the symposiums and roundtables where the participants all expressed the desire to have continued opportunities to meet, to start up arbitrator or mediator associations, to circulate newsletters, and to hold training events.

METHODOLOGY TO ASSESS AND SELECT COUNTRIES

The CDR Project was designed as the result of a number of assessments conducted in the Eastern European and former Soviet regions that found that existing systems for resolving commercial disputes were inadequate or ineffective. These assessments concluded that the lack of effective dispute resolution systems obstructs economic development. Encouraging the development of alternative methods for resolving commercial disputes, particularly arbitration and mediation, was identified as an important goal for creating a functional business environment and for ensuring respect for property and law. To help achieve this goal, the CDR Project mandate was to select and invite developing CDR institutions to cooperate with and learn from a more experienced CDR institution in the same region.

While the project targeted a number of countries within each of these regions, it was necessary to select only a few countries to participate in the project to make the project manageable within the limitations of its resources and to allow for effective networking.

The first challenge for the CDR project was to select a country in each region to host developing commercial dispute resolution institutions. These countries would be selected based on their level of efficient, working, and reputable institutions, and organizations providing widely available, cost efficient, and reputable dispute resolution mechanisms. These institutions would be paired with other countries lacking streamlined organizations within their institutions. It was necessary to assess the status of commercial dispute resolution in the various countries with limited time and resources. The projected used innovative methods to deal with limited resources. The limited

SELECTED COUNTRIES BY REGION

SEED: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Serbia and Montenegro

FSA: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan

resources included a restriction on the number of travel days to conduct the assessment to 20, a prohibition on hiring local staff, and a very short time frame.

To meet this challenge the project devised a five-prong approach to gather information. This approach maximized the amount of information obtained while minimizing the cost of obtaining it. The five components of the method were: inviting the local USAID missions to assist in providing information and contacts, investigating a broad number of generally available sources of published material, establishing a network of contacts involved in CDR in the region, devising and distributing a CDR survey throughout the region, and making quick visits to the regions to collect information, meet and interview stakeholders, and identify and evaluate CDR-provider institutions and projects to determine their potential suitability for participation.

The first prong of the assessment method, enlisting the assistance of the local USAID missions, was not only necessary to obtain the consent of the local mission for the CDR Project to operate within the country, but also to take advantage of the considerable knowledge and contact base of the local mission. The cooperating local missions contributed substantially to the success of the CDR Project by assisting in contacting the important individuals, institutions, and organizations in the assessed country. Additionally, the CDR Project did not want to interfere in the local mission's work in any way and thus it was important to coordinate the work with the local mission. The expertise and knowledge of the local missions was invaluable in identifying particular people who would be appropriate to contact and to alert the CDR Project about local conditions or sensitive issues. Consequently, it was decided that a particular country would not be included in the assessment unless the local mission gave its general assent.

The second prong of the assessment methodology was to conduct an investigation of information generally available on CDR in the target countries. This was done by researching databases, libraries, books, law reviews and journals, trade publications, and the Internet. Information was also sought from other projects, other donors, other organizations, academic materials, business organizations, etc.

The third prong focused on establishing as many contacts as possible that might be able to provide useful information and impressions about CDR in the region. Contacts were sought both in the target countries through other organizations and groups that were active in the target countries, such as donors, trade organizations. These contacts helped to conduct the assessment and were especially important when implementing the project. Throughout the project, we sought the expertise and input of people involved in commercial law and rule of law in the region and commercial dispute resolution experts,

including donors, judges, academics, lawyers, and judicial administrative and training experts.

The fourth prong consisted of designing a survey on the status of commercial dispute resolution that could be sent to the two regions. The survey was devised with the goal of providing a relatively efficient way for contacts to contribute knowledge about CDR in a country. Recognizing that most of the survey recipients might be disinclined to respond to the survey if it took too much time and that it may not be in their native language, the survey was designed without the necessity of providing written responses. To achieve this, the survey contained a number of inquiries that could be answered by circling a number or checking a box and also contained spaces for more elaborate comments. The survey was adapted to be transmitted and returned as an attached document to an email, faxed, or sent through regular mail.

The fifth prong of the assessment method was to make actual visits to selected countries in the region to gather information, make further contacts, and evaluate potential participants in the program. The chief of party visited the regions and met with a broad range of people who represented business groups, lawyers, ministry officials, judges, academics, and people from arbitration and mediation institutions and programs. These visits included Croatia, Montenegro, Slovenia, Georgia, Kazakhstan, Kyrgyzstan, and Russia. Meetings with individuals and organizations interested in or affected by commercial dispute resolution was highly informative and offered an opportunity to develop a network the project could build on.

Based on the assessments, countries in the Eastern European region were selected. These countries included Bosnia and Herzegovina, Croatia, and Montenegro. Albania was invited to a limited degree because the project was designed to only include two or three countries from each region and Albania was not formally assessed. All of these countries had newly created institutions that could benefit from regional linkages and from working with a "model" institution to mentor them.

Georgia, Kyrgyzstan, and Kazakhstan were chosen because they have developing institutions that could benefit from the experience and knowledge of a "model" institution. They were also currently considering the adoption of new legislation to support arbitration. In all of these countries, the development of CDR is at a precarious stage and there was a need to support the development of CDR and encourage them to adopt international standards and practices.

CREATING A PROGRAM OF COOPERATION

Following the assessment, the CDR Project determined which institutions or initiatives would be invited to participate in the program. The project would foster interaction and mentoring between the institutions and other relevant stakeholders. In some of the countries assessed, there were two or three developing institutions competing with each other for market share and recognition as the leading institution. In the case of Croatia, an existing USAID project was supporting two competing projects that were trying to launch mediation services; a third mediation initiative was supported by ABA/CEELI, and yet another new initiative was launched by the Trade and Crafts Union. In Kazakhstan there were three primary arbitration institutes competing for essentially the same users. As a result, it was decided that all serious developing CDR institutions in each of the selected countries would be invited to cooperate with the project rather than selecting a single institution from each participating country. This would avoid having the CDR Project give the impression that it was favoring the success of a particular competing institution and it would also enhance cooperation between the competitors.

In the Eastern Europe region there was greater interest in developing mediation and there were several existing projects and initiatives to support and involve in the project. The developing institutions invited to participate in a symposium for Eastern Europe included:

- Bosnia – Brcko court-annexed mediation program and the IFC-SEED supported court-annexed project
- Croatia – Croatian Chamber of Commerce Mediation Program, the Employers' Organization Mediation Program, the Bar Association mediation initiative, and the Trade and Crafts Union Mediation Program
- Macedonia – Arbitration and Mediation Program of the Macedonian Stock Exchange

- Montenegro – Montenegrin Business Alliance Mediation Program and the Stock Exchange of Montenegro Mediation Program

Because the CDR Project's mandate was to support commercial dispute resolution without promoting a particular model, it was important that the initial event presented dispute resolution options. A representative from the Arbitration Institute of the Bulgarian Chamber of Commerce was invited to attend the first planned event because he could provide regional expertise on arbitration. Two representatives from the Albanian Commercial Mediation & Arbitration Center were also invited to attend the initial event.

The CDR Project recommended the Ljubljana District Court Mediation Program as the "model institution" for the Eastern European region. The Ljubljana program had emerged as a regionally recognized leader in mediation programs. Mediation is the CDR method that has attracted particular interest in the Eastern European region and the Ljubljana District Court had already established an excellent reputation in the region and internationally for its mediation program and was receiving support and recognition from other European and international ADR programs and organizations. Importantly, Ljubljana is a natural and neutral meeting place in the region. In all of the countries assessed, the local stakeholders and local USAID missions agreed that the Ljubljana District Court would provide an acceptable model institution and that Ljubljana would be an ideal forum for the meeting. Importantly, due to similarities in language, it was possible for the representatives of the Ljubljana program to speak directly with the representatives of the "developing institutions" without a need for translation. People from other countries in the region could accept Slovenia as the site for the mentoring "model" institution. Slovenia has long been considered the region's gateway to Western Europe, is a member of the European Union, enjoys a higher standard of economic development, and avoided much of the conflict in the recent war.

In the former Soviet countries, there was little interest in mediation outside of Russia where there was some interest but no significant functioning mediation program. Rather, arbitration had captured the interest of the region and was the focus of existing institutions and projects. Consequently, the CDR Project invited the participation of arbitration institutions and initiatives including:

- Georgian branch of the ICC Arbitration Institute and the Georgian International Court of Arbitration
- International Arbitration Court of the Republic of Kazakhstan and the International Arbitration Court of the IUS Law Center
- International Court of Arbitration of the Chamber of Commerce of the Kyrgyz Republic

The institution selected to be the model institution was the Chamber of Commerce and Industry of the Russian Federation and its arbitration courts. The chamber's arbitration courts are clearly the leader in the region and are well suited to provide assistance and share knowledge with the developing institutions. The experts affiliated with this organization are internationally and regionally recognized. The organization has extensive contacts with international arbitration organizations such as UNCITRAL, and can help the developing institutions adopt best practices. The participating institutions were able to communicate in Russian and they also have similar legal systems. Russia recently adopted the UNCITRAL Model Law on International Commercial Arbitration. The CDR Project established good relationships with the chamber and its three arbitration courts. The Supreme Commercial Court of Russia also agreed to cooperate in the program for training and promotion of efficient CDR. Besides providing an excellent opportunity to provide for judicial education, the cooperation with the Supreme Commercial Court through its chief justice and with the active participation of some its leading judges enhanced the prestige of the CDR Project in the region. This helped the project empower the participating arbitration institutes and increase their credibility with their own judiciaries and ministries.

THE SYMPOSIUMS AND FOLLOW-ON ACTIVITIES

To foster regional communication and interaction and to provide opportunities for sharing and generating knowledge, the CDR Project organized two CDR Regional Symposia where delegates from the participating institutions and other representatives from the countries where these institutions were located could meet and discuss CDR issues. These symposiums were central activities of the project and would set the stage for developing the regional linkages that allow for the continued exchange of information, knowledge and experience. The symposia also provided an opportunity to establish future cooperation between the institutions. They provided a training opportunity where the model could share its knowledge and experience with the developing institutions and others. Some carefully selected technical experts provided additional support and training and generally facilitate the exchange of information, knowledge, and experience. Some of the world's leading arbitration and mediation experts participated pro bono in these events, such as Jernej Sekolec the Secretary-General of UNCITRAL, Ulf Franke, Secretary-General of the International Council of Commercial Arbitration, the International Federation of Arbitration Institutes, and the Arbitration Institute of the Stockholm Chamber of Commerce, and Emmanuel Jolivet, the general counsel of the International Chamber of Commerce. The project also brought leading mediation experts to these events, as well as prominent judges, a court clerk and mediation program directors from the United States.

The delegations consisted of representatives of the CDR institutions and also representatives from the commercial or supreme courts, lawyer organizations or groups, business organizations, academic institutions, and relevant government ministries or bodies. These organizations represented interests that affect the development of CDR in their countries and were invited to gain an understanding of and appreciation for developing CDR and contribute to the discussions. It is essential to the successful and sustainable development of CDR that these institutions and groups promote progress of the

developing institutions and that an appropriate legal environment is created to allow for the implementation of effective CDR. Including these representatives was essential to the success of the project. These are groups with whom the developing arbitration and mediation institutes and program must develop working relationships and have ongoing contact. By bringing representatives to the symposiums it offered the developing institutions an opportunity to demonstrate their credibility and to underscore their advocacy for internationally accepted practices.

The symposia were intended to offer opportunities to discuss a broad spectrum of CDR alternatives and internationally recognized experts in the technical field supported the discussions. The symposiums were designed to be interactive and to allow participants to join in and not be lectured to by experts. The room was set up in a long rectangle with microphones for everyone. Each symposium opened with a report from a delegation from each country and members of delegations were often asked to join the panels presenting particular topics. There were several breakout sessions facilitated by an expert and followed-up with sessions to report back to the group. The symposia ended with a final panel consisting of a representative from each country delegation where they discussed next steps and recommendations for future activities. The many delegates particularly appreciated this format. The enclosed CD Rom includes a list of delegates, experts, and affiliations.

The topics of the symposia included the following:

- Exploring the types of CDR and when to use each type. The participants were exposed to and discussed arbitration, mediation, early neutral evaluation, and mini-trial.
- The importance of enforcing arbitration agreements and the obligations imposed upon contracting states by the New York Convention of 1958.
- Enforcing foreign arbitral awards pursuant to the New York Convention of 1958. Differences in policies and practices when arbitration is strictly domestic and advantages and disadvantages of arbitration over judicial proceedings. Discussions focused on the acceptable level of judicial review and how and when courts should support the process, and how to avoid undermining the process and how to prevent abuse of the process.
- Confidentiality, ethics, methods of safeguarding confidentiality, and how to deal with confidentiality issues in enforcement and subsequent proceedings. Discussion focused on considering the need for ethics and ensuring the integrity of the CDR process, and establishing procedures to anticipate and avoid ethical problems.

- Current international standards in arbitration and mediation legislation and rules, including what should be legislated and what should be regulated by rules or party agreement.
- How to ensure effectiveness and integrity of mediation, as well as when and how cases should be selected and administered. Other topics included designing and implementing a mediation program, selecting, training, and ensuring the competence and integrity of mediators, dealing with complex cases, the role of the court during mediation, degree of party control and contact, and attracting cases and financing programs.
- Designing, implementing, and managing private and court-annexed programs including how to alleviate backlogs and promote settlement in commercial cases. It was important to differentiate between mediation and settlement conferences, and the proper role of the court and judge. Additional topics included preserving the integrity of the process and the role of the court before, during, and after mediation, as well as how to enforce mediated agreements, evaluate and improve the effectiveness of programs, and foster the trust of the public, government, lawyers, and businesses.

The follow-on events in the two regions focused on the mediation for Eastern Europe and arbitration for the former Soviet countries and took the form of roundtable discussions. The Eastern European regional event took place in Sarajevo and the former Soviet Union regional event took place in Almaty, Kazakhstan and Bishkek, Kyrgyzstan. These follow-on events were intended to allow the developing institutions to play a central role as an organizer and host of the event. Leading representatives from the model institutions participated as faculty along with a few leading international technical experts.

The Eastern European event was organized in cooperation with the IFC-SEED Project, which has a five-year regional mediation program currently in place. These events were greatly appreciated by the participating stakeholders and provided opportunities to explore specific topics in more detail than the symposia. The participants actively took part in lively discussions and used the opportunity to learn from the experience of the invited representatives from the mentoring model institutions. Although leading technical experts who provided services pro bono supported the events, it was apparent that the local stakeholders were particularly interested in posing questions to the regional experts from the model institutions.

The delegates at each event also received hundreds of pages of valuable materials on CD ROMs, which were prepared by the contributing experts. These materials included model laws, model rules, program design manuals, forms, case summaries, and many other useful resources. Copies of the program for each symposium are included in the enclosed CD Rom.

RESULTS

The CDR Project achieved its overall objectives and its specific goals in a number of ways.

As noted in the introduction, the three overall program objectives focused on establishing policy, legal and regulatory framework, strengthening institutions that can implement legal reforms and support the rule of law, and stimulate private sector development.

Policy, legal, and regulatory framework. The CDR Project actively promoted the adoption of legislation and policies to support the development of arbitration and mediation at a critical time in the targeted countries. During the life of the project new arbitration laws were introduced or adopted in Kazakhstan, Kyrgyzstan, and Georgia. In all of these countries, the adoption of a modern law was controversial.

The CDR Project was able to promote the adoption of a law based upon the UNCITRAL Model Law, adopted in 1985 after years of work by international experts and now adopted in more than 60 jurisdictions. There is a great advantage for a country, particularly a developing country, to adopt a national arbitration law based on the UNCITRAL Model Law. It provides not only the benefits of a single, comprehensive law that reflects international consensus, but it also has the benefit of extensive supportive commentary and databases that can assist in interpreting and applying the law. This can be especially useful in countries where there is a paucity of reported cases and commentary such as the in the former Soviet Union countries. It also makes the law more transparent and accessible for foreign investors, thus promoting investment. Case law and commentary from around the world in a number of languages can be used to understand and apply the law. Another benefit of the law is that its provisions on challenging and enforcing arbitral awards mirror the provisions of the New York Convention thus encouraging a unified approach. The delegates at the Moscow symposium were supplied with English and Russian language copies of the Model law and the UNCITRAL Model Arbitration Rules. The UNCITRAL Secretariat worked together with the CDR Project to provide the delegates with a selection of excerpts from approximately 60 cases applying the pertinent provisions of the law.

The Senate of Kazakhstan invited me to contribute to the draft laws on International Commercial Arbitration. It is a great honor for our court. Thanks to the Symposium in Moscow and introduction to Mr. Sekolek of UNCITRAL, who subsequently prepared comments on the draft law; most of his and our comments were taken into account.
– AYA BRALINA, DEPUTY CHAIRMAN, INTERNATIONAL ARBITRATION COURT, KAZAKHSTAN

Although the CDR Project was not directly involved in the legislative process, it significantly contributed to encouraging the adoption of laws that reflect international standards and avoid parochial or unusual provisions that undermine effective arbitration and consequently hinder trade and private sector growth. Support for adopting modern legislation was given to the delegates at the symposium and at the follow-on events, which were attended by people who were able to influence the legislative process. The model institution representatives, as well as the Russian judges, could discuss with delegates the benefits of adopting a modern arbitration law based upon the UNCITRAL Model Law since Russia adopted such a law just a few years ago.

At the Moscow symposium, the CDR Project introduced the Kazakhstan delegation to the Secretary-General of UNICTRAL and arranged for him to provide advice on the proposed legislation. As a result, of the Moscow sessions, the UNCITRAL Secretariat reviewed and commented upon the Kazakhstan proposed arbitration law and advised amending some provisions to bring the law in line with international standards. The recently enacted new law reflects the changes recommended by UNCITRAL. The adoption of the new law is a major success in Kazakhstan where during the past few years there has been some resistance to arbitration by the General Prosecutor's Office. The CDR Project invited representatives of the General Prosecutor's Office to attend the events and discuss these important issues with international and regional experts and its own fellow stakeholders.

UNCITRAL sent its senior legal expert, Renaud Sorieul, to participate at the follow-on events in Alamaty and Bishkek. He was able to comment on the recently adopted Kyrgyzstan law inspired by the UNCITRAL Model Law. The Supreme Court and other judges at the follow-on events also obtained guidance from the model institution's expert and a leading Russian Commercial Court judge on properly interpreting and applying the new law, as well as the New York Convention. They were interested in learning from the Russian judge and professor because they spoke a common language and understood each other's legal culture, traditions, and principles. This stakeholder-to-stakeholder mentoring was an especially effective way to encourage adopting appropriate application of the law.

The CDR Project arranged for the proposed Georgian arbitration law to be reviewed and commented on by the UNCITRAL Secretariat. Some of the people on the USAID-supported arbitration law committee were delegates at the Moscow symposium and they were able to approach the new legislation with the knowledge they gained at the symposium.

Through its events and supporting materials, the CDR Project has encouraged parliamentarians, judges, ministry officials, academics, lawyers, and institution representatives to adopt internationally accepted standards and interpret and apply the relevant laws and conventions.

In the Eastern European region progress has been made in enacting legislative structures to support the development of arbitration and even more so, mediation. In both Croatia and Bosnia new mediation laws based on the UNCITRAL Model Conciliation Law have been enacted. In Montenegro a new law for arbitration and mediation was being worked on during the course of the project and was just recently passed, thus creating the necessary statutory base for arbitration and mediation. Just as in the former Soviet region, the CDR Project was able to encourage the enactment of modern laws reflecting international consensus on best practices through the symposium and follow-on events. For example, in one country there was some resistance in the Ministry of Justice to adopting court-annexed mediation. The CDR Project included a representative from the ministry in the symposium to afford the opportunity for discussions about resolving the concerns.

Strengthening institutions that can implement legal reforms and support the rule of law. The selected model and developing institutions were strengthened through their participation in the CDR Project and have improved their capacity to contribute to implementing legal reforms and supporting the rule of law. By having the opportunity to meet colleagues from neighboring countries in the region the representatives from the developing institutions were able to share experiences and information that helps them adopt better practices and become more effective.

The extensive knowledge sharing the CDR Project facilitated enhanced the ability of a wide range of institutions and stakeholders including arbitration and mediation institutions, courts, lawyers, academics, ministry officials and parliamentarians. In addition to participating in the symposiums and roundtable events, which offered high-level technical expertise and education, the participants were provided extensive materials to use when they returned home. For example, the Federal Judicial Center donated books on court-annexed ADR Programs and the American Bar Association generously allowed the CDR Project to distribute the chapter on court-annexed mediation programs from its new book on ADR. The International Chamber of Commerce also distributed its materials and UNCITRAL generously prepared a collection of important case excerpts. The San Mateo and Los Angeles Court-annexed mediation and arbitration programs contributed comprehensive materials regarding the design, administration, and evaluation of programs. All

Alternative resolution of disputes arise from any civil relations is a very important element for successful development of business in Kyrgyzstan. According to the opinion of Mr. A. Akaev, the former president, more than 80 percent of the population don't believe to the state (government) judicial system. However, effective and developed law should encourage and stimulate formation of a strong and reputable institution of alternative dispute resolution. Such a law should regulate state court enforcement of arbitral awards, including execution writs, and should prevent state courts from attempting to control arbitral proceedings or from reviewing arbitral awards on the merits.
– NATALIA GALLIMOVA, VICE CHAIR, INTERNATIONAL COURT OF ARBITRATION (IN AFFILIATION WITH THE CHAMBER OF COMMERCE, AND INDUSTRY), KYRGYZSTAN

of these materials will help strengthen institutions involved in arbitration and mediation and help them to become more effective.

The developing institutions and the people and organizations supporting CDR were empowered by participating in the project because they were able to increase their credibility and strengthen their position in their communities by demonstrating that they had the support of not only the CDR Project but of important stakeholders from neighboring countries in the region and prominent international experts and organizations. The representative from a developing institution may have difficulty encouraging important judges in their country to respect arbitration awards. However, it is much more effective when the developing institution representative could participate in a symposium or roundtable event with representatives from the courts in their country and discuss CDR issues together with prominent experts and CDR-supporters from neighboring countries.

The CDR Project regional networking encouraged the stakeholders to share information and experiences after the planned events concluded. For example, following the Moscow symposium the director of the International Court of Arbitration in Kazakhstan shared all of the brochures, rules, model arbitration clauses, newsletters, and other marketing tools with the representatives of the developing institutions from Georgia. The Russian model institution also shared its materials with the developing institutions in the former Soviet Union countries.

Stimulating private sector development. The CDR Project helped to stimulate private sector development by encouraging the development of efficient dispute resolution methods. By ensuring disputes are resolved businesses are encouraged to invest capital into new markets. The process of resolving a case also releases capital that can be reinvested into new business opportunities. The IFC/SEED pilot project estimates that the 23 successful mediations achieved by the Banja Luka pilot project during 2004 released 2 million convertible marks into the economy.

LESSONS LEARNED

Sensitivity to existing culture. Legal reform does not occur in a vacuum. It is important to take stock of the forces that may affect a particular project. Factors that affect the success of an arbitration program may be rooted in historical, political, social, legal, or business considerations. The continuing effects of previously totalitarian or state-dominated systems should not be discounted and the fragility of new democracies should be considered. Even if the system has been formally changed, engrained attitudes may remain and powerful interests and influential people may retain substantial control and impact. Political factors are important since the success of an arbitration promotion program is dependent upon favorable political support or at least limited political resistance. Political influence is not restricted to the realm of creating the necessary legislative structure and adopting international conventions. The impact of social factors should also be taken into consideration. For example, in some cultures in the former Soviet Union there is a historical tradition of "wise men" deciding disputes, which may be exploited in establishing an arbitration or mediation program, particularly in provincial areas. However, this may actually undermine such a program because it may create dissonance in the expectations of the proper role of the arbitrator or mediator and the decision-making process. Legal principles, particularly procedural ones that underlie the more detailed rules of a procedural code should also be considered because they can have a substantial impact on how lawyers, arbitrators and judges may approach a broad range of arbitration or mediation issues.

A modern commercial dispute resolution regulatory framework. This is essential for creating an environment in which arbitration can thrive. This framework should include modern national laws supporting arbitration and mediation, one example being the UNCITRAL Model Laws, as adapted to the local context. Multilateral and bilateral conventions and treaties also provide an important source of support for and regulation of arbitration. More than 130 countries have adopted the New York Convention that makes arbitration agreements and awards widely enforceable throughout the world. The failure of a country to adopt the New York Convention sends a powerful message to investors. More than 150 countries are signatories to the Washington Convention that provides for ICSID arbitration for disputes between states and foreign investors. Fortunately, all of the countries in the CDR Project have adopted the New York

Convention and the Washington Convention. However, signing and ratifying a convention is one thing, it is another to establish a reputation of respecting treaty obligations and in many of the former Soviet Union countries there have been problems with court interpretation of the New York Convention, particularly in provinces. There are more than 2,000 bi-lateral treaties (BITS) in the world today and all of the CDR-targeted countries have entered into a number of BITS that provide for arbitration, often either by ICSID, another institution, or ad hoc proceedings pursuant to UNCITRAL Rules. Although increasingly the benefits of BITS for contracting developing countries are being questioned, it is nonetheless generally accepted that a country that has become a signatory to treaties and conventions supporting arbitration is more likely to attract investment than a country that has not. The Energy Charter Treaty is also an important source of an obligation to arbitrate and this is particularly relevant for the former Soviet countries that have oil and gas resources. There are also regional conventions that may have an impact on arbitration such as the European Convention on International Commercial Arbitration (Geneva, 1961), the Convention of the Settlement of Arbitration of Civil Law Disputes Resulting from Relations of Economic, and Scientific-technical Co-operation (Moscow, 1972).

A long-term approach with specific activities. Developing an arbitration-friendly environment requires changing legal culture, which is an inherently slow and complex process. While a successful project should adopt a broad, long-term approach to promoting arbitration, it nonetheless needs to identify specific activities where notable results can be achieved. Such activities can be, for example, targeting particular groups for educational efforts, developing an arbitration course at a law school, running roundtable discussions, creating administrative procedures for an arbitration institute, launching an Internet-based information site, designing a public awareness program, putting on mock arbitrations for business groups, training lawyers to represent parties in arbitration, starting an email-based newsletter, publishing articles about arbitration, seminars for judges, courses in conducting arbitrations and drafting awards for arbitrators, etc. These are the type of activities identified by the stakeholders as desired next steps.

Avoiding political interests. Because arbitration is subject to regulation and courts and execution authorities can either promote or deter effective arbitration, there is always a serious risk that arbitration can be undermined if it is targeted by political interests that can influence legislation, courts, and execution authorities. Changes in the political sphere can thus have dramatic affects on the arbitration environment. When a large number of stakeholders have invested in

Our work together on the round table is, to say the least, one of the finest examples of donor cooperation and support. – LADA BUSEVAC, BUSINESS ENABLING ENVIRONMENT TRUST FUND COORDINATOR, SEED PROJECT, WORLD BANK/IFC

the support of arbitration, it will be more politically controversial to carry out direct or indirect measures that may undermine arbitration. Consequently, greater stakeholder ownership and broader-based stakeholder support will help to minimize the risk of an arbitration project becoming undermined by political interests.

Involvement of variety of stakeholders. The stakeholders in an arbitration project can be divided into at least seven categories: politicians or parliamentarians, institutions such as the ministry of justice, general prosecutor's office, or execution authorities, arbitration service providers, lawyers, judges, academics, and users such as business organizations. The involvement of all of these groups is essential to a successful arbitration project, even one with a limited scope. Experience throughout the world has demonstrated that any one of these groups can have a significant negative impact on developing arbitration. However, the three groups, which are probably the most obvious, are the arbitration service providers, the lawyers, and the judges.

Cooperating with donors and other organizations. An ongoing and important challenge for donor agency projects is continuous coordination and awareness of specific activities. The absence of coordination can, in a worst case scenario, mean that the same doors will be knocked on, the steps retraced, and the repetition of activities often will not harvest heightened results but may actually diminish the effectiveness of everyone's work. The CDR Project found a lack of coordination between various donors and other organizations. This is attributable, in part, to meager awareness about what each group is planning to do prior to commencement of the particular activity. At times, donors and other organizations do not learn of an activity until after the activity has begun, or even ended. Even among projects funded by the same donor, the CDR project in some cases found little collaboration. However, the CDR Project did find some exceptions. In Kyrgyzstan, for example, the CDR Project was able to effectively work together with another USAID project managed by another company. Although the CDR Project began activities by trying to learn about other projects and initiatives and to find ways to collaborate, coordination was not the norm. To remedy this problem, donors and other organizations need to incorporate into the design and implementation of projects incentives and mechanisms that lead to better coordination so as to leverage resources and achieve heightened results.

RECOMMENDATIONS FOR FUTURE ACTIVITIES

There is a tremendous interest and need for improving the availability of effective commercial dispute resolution in both the Eastern European and former Soviet regions. Stakeholders representing a broad range of groups, institutions and professions are eager to both offer and use arbitration, mediation and other forms of dispute settlement. Throughout the regions, there are developing institutions and programs which should be supported. Here are some ways in which the enthusiasm and commitment of these stakeholders could be supported. The stakeholders themselves have generated these ideas in the next-step breakout sessions and round-table discussions that were arranged by the CDR Project.

- Regular regional meetings reaching out to a broad group of stakeholders
- Local roundtable events supported by regional or international experts
- Regular meetings between representatives of arbitration or mediation institutes
- Create regional associations of arbitrators and mediators
- Regional training programs for particular groups such as judges, arbitrators, mediators, program administrators, and lawyers
- Email list serves
- Newsletters
- Opportunities to have prolonged visits at more developed institutions
- Opportunities to have more stakeholder-to-stakeholder mentoring
- Regional business and public outreach
- Support for developing materials and training programs
- Support for developing law school curriculum
- Pilot projects that can be used to generate information and share experiences.

CD ROM INDEX

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